IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

TUESDAY, THE 4TH DECEMBER 2007 / 13TH AGRAHAYANA 1929

AS.No. 331 of 2001()

OS.130/1996 & 91/98 of PRL.SUB COURT,TRIVANDRUM
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APPELLANT/PLAINTIFFS:
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1. E.GRACY, D/O EDWARD ALIAS A.RAMAKRISHNAN, FROM SHALEM HOUSE, T.C.11/1867, Y.M.R.JUNCTION, NANTHANCODE, THIRUVANANTHAPURAM, RESIDING AT T.C.11/1610, ELIM, Y.M.R.JUNCTION, NANTHANCODE, THIRUVANANTHAPURAM.

2. S.P.K.KUMAR ALIAS KUMAR JOSEPH, S/O PARADESI FROM MATHUVILA HOUSE, AZHAKANPARA P.O., MANAVALAKURICHI, K.K.DISTRICT, RESIDING AT T.C.11/1610, ELIM, Y.M.R.JUNCTION, NANTHANCODE, THIRUVANANTHAPURAM.

BY ADV. NAGARAJ NARAYANAN,
RAJAN VELLOTH,
SAIJO HASSAN
R.T.PRADEEP,
VIJULAL,
VINOD KUMAR A.N.

RESPONDENTS/DEFENDANTS:
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1. J.CHRISTOPHER, S/O JUSTIN, CRISS VILLA, T.C.4/2287, KOWDIAR WEST, KURUNGANNOOR MURI, KURAVANKONAM, THIRUVANANTHAPURAM.(**DIED**)

*2. FREEDA CHRISTOPHER, W/O LATE J.CHRISTOPHER, CROSS VILLA, T.C.4/2287, KAVADIYAR WEST, KURAVANKONAM, TVM-3.

3. C.JUSTINIAN, S/O LATE J.CHRISTOPHER -DO- -DO-

4. C.ALFRED EINSTEIN, S/O LATE J.CHRISTOPHER, -DO- -DO-.

5. C.HEPHZIBAH RAJKUMAR, D/O LATE J.CHRISTOPHER, 645, T.H.ROAD, THONDAYAR PETTAH, CHENNAI.

6. C.BEAULAH MOHANRAJ, D/O LATE J.CHRISTOPHER, NO.9, KUNDALAKERI STREET, MUTHAMIL NAGAR, TANJOR – 7.

(R2 TO R6 REPRESENTED BY POWER OF ATTORNEY FREEDA CHRISTOPHER).
*RESPONDENTS 2 TO 6 IMPLEADED AS AS PER ORDER DATED 28.2.2003 ON C.M.P.NO.1141/03 IN AS.331/01)

BY ADV. S.SUBHASH SYRIAC,CAVEATOR
SRI.K.RAMACHANDRAN
SMT.M.MEENA JOHN
GOVERNMENT PLEADER SHRI C.M.KAMMAPPU

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 04/12/2007, ALONG WITH AS NO. 501 OF 2001 & CROSS OBJECTION, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.R.RAMAN & V.K.MOHANAN,JJ..

A.S.Nos.331/01, 501/01 & CROSS OBJECTION

DATED THIS THE 4th DAY OF DECEMBER, 2007

J U D G M E N T

Raman, J.

These two appeals and the cross objection arise out of the common judgment rendered in O.S.No.130/96 and O.S.No.91/98. Parties are common. A.S.No.501/01 arises out of the suit O.S.No.91/98 and A.S.No.331/01 arises out of O.S.No.130/96. O.S.No.130/96 is a suit for declaration of right, title and possession and to set aside the sale deed and for injunction. O.S.91/98 is a suit for injunction. Plaintiffs in O.S.No.130/96 are the defendants in O.S.No.91/98. The contention of the parties as revealed by the pleadings in the respective cases can be summarily stated as follows:

2. The plaint schedule properties originally belonged to deceased Jaslet Justin, Shalem House, Nanthancode, Thiruvananthapuram. Plaint item Nos.1 and 2 in O.S.130/96 were purchased in the name of Jaslet Justin out of the fund contributed to her by her husband. Plaint item No.3 was purchased by Jaslet Justin herself. Jaslet Justin died on 21.12.1995. All the plaint items were in absolute possession and enjoyment of Jaslet Justin till her death. She

had no issues. The 1st plaintiff was brought up by Jaslet Justin as her own daughter. She was brought to the Shalem house by the deceased on 2.1.1976 while the first plaintiff was at the age of 5 years by Edward, the husband of the deceased Jaslet Justin. Since then first plaintiff had been maintaining and looked after by them. She was also given primary education. Edward died in the year 1980. Jaslet Justin continued her motherly love and affection towards the first plaintiff. When the first plaintiff reached the marriageable age, she was given in marriage to the second plaintiff on 31.5.1988. After the marriage, the first plaintiff resided at Tamil Nadu and later started residing at Shalem House. They had two children. Shalem House is situated in plaint Item No.1 which also consist of another building by name Edward Memorial Prayer Hall. Item No.2 is a two storeyed building put up by late Edward. Plaintiffs are residing in item No.2. The defendant is none other than the brother of the deceased Jaslet Justin. He is attempting to snatch away the properties of Jaslet Justin. When there was an attempt to oust the first plaintiff from the Shalem house, a complaint was made to the Police in December,1995. But, exerting influence on the Police, not only no action was taken against him, but Police forcibly evicted the first plaintiff. During April 1994, Jaslet Justin

executed a will produced in the case as Exhibit A13. The information regarding the will was obtained by the plaintiff from Nelson who is an attestor to the will was examined as PW2. According to them, the will was searched and found out from a metal box along with other belongings of Jaslet Justin. A gospel service was conducted in the Edward Memorial Prayer Hall by Paster P.D.Nelson, PW2 under the first plaintiff after the death of Jaslet Justin. The defendant has no manner of right over the said Prayer Hall. From the plaint in the connected suit,O.S.91/98(formerly O.S.No.47/96), she came to know that the defendant is claiming title over the plaint item No.1 as per Exhibit A1 sale deed dated 26.5.1994 of S.R.O., Pattom and has set up a claim of title over item No.2 by virtue of another sale deed Exhibit A2. The second deed Exhibit A2 was executed on 20.12.1995, just on the previous date of the death of Jaslet Justin. These sale deeds are vitiated by fraud and were not supported by any consideration. It lacks free will and consent of the vendee and the document has not taken effect. It is further averred that Jaslet Justin was hospitalised during December, 1995. She was a cancer patient. Later, she was discharged from the Hospital when the defendant took her to the Chriss Villa, where the plaintiff's access was denied. The sale deeds

were of creations vitiated by fraud and coercion. There was absolutely no necessity to alienate any property during the life time of Jaslet Justin. The documents are therefore liable to be set aside. The suit is instituted for declaring right, title and possession and recovery of possession of Shalem house. There is also a prayer for setting aside the sale deeds Exhibits A1 and A2 and for an injunction against the defendants from trespass.

3. The defendants contended that plaint items were the self acquisition of deceased Jaslet Justin. She was a Government employee in the Central Press, Trivandrum. She did not own or possess properties at the time of her death on 21.12.1995. The three buildings in plaint items 1 and 2 were left out by the defendants in May, 1981. He was conducting Gospel Service under the name Jesus Calls Follow Up Ministry. Later he purchased plaint Item No.1 in 1994 as per Exhibit A1, from Jaslet Justin. Item No.2 was purchased as per Exhibit A2. Item No.3 was transferred in favour of a trust formed under Jesus Calls Follow Up Ministry as per sale deed No.5128/95, ie; Exhibit B3 in the case. It was transferred for the purpose of burial ground. All these three items were thus in exclusive possession of the defendant. Item No.3 is possessed in his capacity as a trustee. All

allegations in the plaint are denied. The fact that the first plaintiff had gone to the residence of Jaslet Justin is admitted. But according to the defendant, she was a servant and she was given in marriage giving full remuneration. Thereafter she resided with the second plaintiff, her husband. The allegation that they lived in the Shalem House is denied. The right or title over the plaint schedule properties as claimed by the plaintiffs are denied. They are strangers for them. There is no manner or right, title or interest over the property. PW2 Nelson was never served as a Paster in the Edward Memorial Prayer Hall. Deceased Jaslet Justin never executed a will as alleged in the plaint. After the death of Jaslet Justin, plaintiffs are attempting trespass into the property situated in plaint item No.1. There was a Police case and a crime was registered at the instance of a complaint made by the defendant. The photocopy of the will produced in the case is fabricated (in this connection it will be noticed that subsequently the original deed was produced before the court). The sale deeds are all bonafide executed by free consent of the deceased. It is admitted that she was suffering from breast cancer and was under treatment at RCC on 5.12.1995 and was treated by defendant and on her discharge, she was taken to the defendant's house. She died on

21.12.1995. The fraud alleged in the execution of the sale deed is denied. The suit instituted by the plaintiffs is only a counter blast of the suit O.S.No.91/98(formerly O.S.No.47/96).

4. In the other suit, O.S.No.91/98 instituted by the defendant in O.S.No.130/96, it is averred that he was in absolute possession and enjoyment of the plaint schedule property and the building as per a registered sale deed. The building in the plaint schedule property is used as a prayer hall named as Edward Memorial Prayer Hall. They reiterate the averments in the written statement filed in the other suit and to avoid repetition it is not stated here. The suit was later amended since the suit was originally filed for injunction restraining the defendants from entering the plaint schedule item and the building thereon. Subsequently, they also prayed for a declaration on the strength of title and possession over the plaint schedule property and the building. The plaintiffs in O.S.No.130/96 who are the defendants in the other suit filed written statement reiterating their contentions as averred in the plaint filed by them. The court below framed several issues for trial. Evidence was let in common. The evidence consist of the oral testimony of PWs 1 to 6 and DWs 1 to 3 and documentary evidence. Exhibits A1 to A13, Exhibits B1 to B4 (series), B5 series, B6

to B17 series, X1 and X2 series were also marked.

5. The main issue took up for consideration was as to whether the will alleged to be executed by Jaslet Justin is genuine. This is an issue arising in O.S.No.130/96. Exhibit A13 is the will produced in the case. True, that it does not contain any schedule of properties except the statement that all the properties left on the death of Jaslet Justin are bequeathed in favour of the plaintiffs. The first plaintiff, no doubt, is not the legal heir of the deceased. The second plaintiff is her husband. The defendant is the brother of deceased Jaslet Justin. In the absence of any descendants under clause I, the defendant will be one of the heirs falling in Clause II. Besides the defendant, the deceased had a sister also. Thus they are the natural heirs entitled to succeed to the estate of the deceased, had the deceased died intestate? The will is dated 20.4.1994. To prove the will, DWs 2 and 3 were examined. They are attesting witnesses. It is true that there may not be direct evidence. It is true that there is no available evidence to show that the first plaintiff was the daughter of deceased Jaslet Justin. But the fact remains that she was with the deceased until she was given in marriage. The school records produced will not however, evidence any relationship with Jaslet Justin. But all the

same, the first plaintiff was brought up by Jaslet Justin and she was given in marriage to the second plaintiff. So much is admitted in the written statement. But according to the defendant she was only a maid servant. Be that it may, in the absence of any legal heir for the deceased, the conduct on the part of the deceased in constructing a prayer hall and conducting prayers therein, would show that her attitude and approach in life. A girl who had no other near relation to be looked after and financially poor was brought to her house at the age of 5 and given her all motherly love and affection cannot in the factual circumstances be held improbable. But the question is whether the will bequeathing the entire property in her favour disinheriting all other natural heirs can be said to be a natural conduct on the part of the testator and whether the will for the reasons stated in the written statement is genuine or not. The court below while examining these aspects of the matter did not discredit the testimony of PWs 2 and 3. But at the same time, the court below placed reliance on the following facts to raise suspicion about the will.

1) The will was kept in a metal box and not in an iron safe.

2) When Jaslet Justin admittedly was a Government employee working in a press, she would have better chosen a friend or near

relation to be an attesting witness to the will rather than PWs 2 and 3 who are mere chance witnesses.

3) The will breaks the line of succession disinheriting natural heirs.

4) The will was not proved to have been written in the handwriting of the testator.

6. We have carefully considered the above finding. Merely because the will was kept in a metal box and not in an iron safe or that PWs 2 and 3 attestors are not related to the deceased by itself are no reason to raise any suspicion regarding the validity of the will.

7. However, the learned counsel appearing for the respondent has pointed out certain other aspects which the courts below have failed to consider. According to him, the very execution of the will is disputed and a specific plea has been placed in the written statement. Therefore the burden to be discharged by the plaintiffs is heavy. According to him, when admittedly the will is not written in the handwriting of the testator, a question arises as to who prepared the will and in what circumstances the will was prepared and there is absolutely no evidence in this regard. Secondly, the signature itself was disputed. He has placed reliance on a document produced at the

appellate stage to suggest that evidence of Forensic Expert would show that the signature contained in the will is not genuine. But the court below had not gone to refer to these aspects of the matter while adjudicating the dispute. The court below after holding that the will is not proved to be genuine, proceeded to dismiss the suit O.S.No.130/96 and decreed O.S.No.91/98. But the court below did not consider the validity of the sale deeds specifically challenged in O.S.No.130/96. It was the specific case of the plaintiffs that two documents were executed just on the previous date of death of the deceased and it was a house registered document. The very fact that the deceased was treated at the R.C.C. prior to her death is admitted by the defendant. As regards Exhibit A1, the same was executed as early as in 1994. But the courts below did not examine the validity or otherwise of the sale deed in question on the ground that the plaintiff is not a heir entitled to succeed to the estate of the deceased. Hence even if the sale deeds are assumed to be invalid, the plaintiffs cannot have any share in the property and that the plaintiffs have no locus standi. At the same time a declaration as against the plaintiff is granted declaring that the sale deeds are valid. Admittedly the sister who is the other heir entitled to succeed to the estate of the deceased

was not a party to the proceedings. We find that the court below erred in not deciding the validity or otherwise of the sale deeds Exhibits A2 and B3, since even if the will executed is found to be valid but if the sale deeds are also found to be valid, then there is no property left by the deceased at the time of death, to be pass on. This plea is raised in the written statement filed in O.S.130/96. Therefore the validity or otherwise of the sale deed is interlinked with the issue as to whether the plaintiffs could succeed in proving that they have got title based on the will. We find, on an overall consideration of the entire matter, the matter requires reconsideration. Appellant has also produced certain documents before this court and in the view we are taking it is not necessary to mark those documents rather than giving the parties an opportunity to adduce whatever materials and to prove the same in accordance with law. The court below found that the suit itself is not maintainable. We find that section 213 of the Indian Succession Act will not apply to Christians by virtue of the amendment brought out in 2002. True, at the time of decreeing the suit, this amendment has not come into force. But when the matter is canvassed in appeal and when the appeal is pending before this court, the amendment has already come. The amendment cannot be said to be retrospective but

it is declarative. The express words used in section 213 will clearly show that it only bars the plaintiffs from establishing any right based on a will as a legatee unless it is probated. But by virtue of the amendment, the said section has been made not applicable to Christians. If so, since we are remanding the matter to the trial court, the bar under section 213 will not apply at this stage. Thus the question regarding the validity or otherwise of the will on merits will have to be re-determined by the court below after affording an opportunity of being heard to both sides to adduce additional evidences in this regard. So also validity of the sale deeds will also be decided by the court below on merits. Thereafter the court below shall dispose of the matter in accordance with law.

8. The appeals are accordingly allowed. The court fee is refunded. Records would be transmitted to the court below. The original of the documents, if any, produced as additional documents is permitted to be taken by respective parties so as to enable them to produce the same before the court below.

9. Since a criminal case is pending investigation regarding the genuineness of the will, the Government has filed a petition for releasing certain documents. Since the matter is remanded to the

court below a petition to that effect can be made before the court below and the court below will pass appropriate orders.

Parties shall appear before the court below on 18.1.2008.

P.R.RAMAN, JUDGE

V.K.MOHANAN, JUDGE

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